No. 15-6418

IN THE

Supreme Court of the United States

GREGORY WELCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review.

II. Whether petitioner's prior Florida conviction for robbery qualifies as a "violent felony" supporting sentence enhancement under the ACCA, 18 U.S.C. § 924(e)(2)(B).

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 91 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals in federal court each year, including thousands who are facing or serving sentences under the residual clause of the Armed Career Criminal Act or the Career Offender Guideline. *Amici* therefore have both particular expertise and interest in the subject matter of this litigation. The issues presented and their broader implications are of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

In *Johnson v. United* States, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. *Amici* agree with both the

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[1] The parties to the case, including *amicus* appointed by the Court, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. Sup. Ct. R. 37.2(a). No counsel for a party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

Petitioner and the United States that *Johnson* announced a new substantive rule that therefore applies retroactively to cases on collateral review. In footnote 9 of its brief, however, the government suggests a different result for those whose sentences were increased under the identical clause of the Career Offender Guideline, U.S.S.G. § 4B1.2(a)(2).

Amici write principally in response to footnote 9. The government first states that "*Johnson* did not address whether its holding applies to the Guidelines." As explained below, the Court's constitutional holding in *Johnson* applies with equal force to the identically worded and interchangeably interpreted residual clause in the Career Offender Guideline.

The government also states that "*Johnson* is not entitled to retroactive effect" in Guidelines cases, and asserts that this is so because "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." The government's claim squarely conflicts with circuit precedent and its own position that this Court's ACCA-narrowing decisions are retroactive in ACCA cases and Guidelines cases alike. Moreover, the definitions of "procedural" and "substantive" rules that the government uses to support its newfound position are legally unsound and unnecessary to the decision in this case.

Amici therefore respectfully request that the Court not endorse the government's novel position or definitions in any way. The Court should decide this case under well-settled retroactivity principles, and, without presuming the outcome in this case, in a

manner that does not suggest a different result in the Guidelines context.

Amici also ask the Court to definitively resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term. There is an ever-shortening one-year statute of limitations, requiring all federal prisoners to file any *Johnson*-based § 2255 motions by June 26, 2016—one year from the date *Johnson* was decided. Reflecting the understanding that ACCA decisions apply retroactively in both ACCA and Guidelines cases alike, the lower courts are now staying both ACCA and Guidelines cases pending a decision here. Because the government continues to advance its newfound litigation position in the lower courts, an affirmative holding in this case will not definitively resolve the retroactivity issue in Guidelines cases until after the expiration of the one-year statute of limitations.[2] Given the looming statute of limitations, the Court should resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term, for many of the same reasons it granted *certiorari* and expedited briefing in this case.

Amici are aware of two cases, one pending in this Court and the other forthcoming, that provide an opportunity to definitively resolve *Johnson*'s retroactivity in the Guidelines context: *In re Rivero*, No. 15-7776 (S. Ct. filed Jan. 14, 2016), an original habeas matter in which the Court has ordered a response from the United States (due March 2, 2016), and *United States v. Alfrederick Jones*, No. 14-2882

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[2] While no court of appeals has definitively resolved the issue, the courts are reaching divergent conclusions in *dicta* and in non-precedential orders.

(3d Cir. reh'g denied Jan. 22, 2016), a forthcoming petition for *certiorari* from the Third Circuit's denial of a certificate of appealability. *Amici* respectfully urge the Court to accept both cases and decide this important issue this Term.

ARGUMENT

I. *Johnson*'s Holding Applies To The Identical Residual Clause Of The Guidelines.

The government states that "*Johnson* did not address whether its *holding* applies to the Guidelines." U.S. Br. 38 n.9 (emphasis added). But the absence of such an express statement does not mean the question is open. While the Court held that the residual clause in the definition of "violent felony" in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness, the Court's constitutional holding applies with equal force to the identically-worded and interchangeably interpreted residual clause in the definition of "crime of violence" in the Career Offender Guideline, U.S.S.G. § 4B1.2(a)(2).

This conclusion is compelled by *Johnson* itself, is reinforced by the residual clause jurisprudence of this Court and the lower courts, and is the government's national litigation position: "*Johnson*'s constitutional holding regarding ACCA's residual clause applies to the identically worded Guidelines residual clause" because it "uses the same language that *Johnson* held 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" Supplemental Brief for United States at 6-7, United States v. Pagan-Soto, No. 13-2243 (1st

Cir. Aug. 11, 2015) (quoting *Johnson*, 135 S. Ct. at 2558).[3]

A holding is the "necessary" and "pivotal" logic that results in a decision in the case. *Black's Law Dictionary* (10th ed. 2014) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996); *see also Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 668 (1989) (separate opinion of Kennedy, J.) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."), *abrogated on other grounds by Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014); *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (opinion of Breyer, J.) (*stare decisis* "commands judicial respect for a court's earlier decisions and the rules of law they embody").

The "residual clause" defines the terms "violent felony" and "crime of violence" identically as an offense that "otherwise involves conduct that

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[3] *See also, e.g.*, Appellee's Supplemental Brief at 3-4, United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159); Brief of Plaintiff-Appellee at 9-12, United States v. Gillespie, No. 15-1686 (7th Cir. Sept. 14, 2015); Rule 28(j) Letter Filed Sept. 28, 2015, United States v. Townsend, __ Fed. Appx. __, 2015 WL 9311394 (3d Cir. Dec. 23, 2015) (No. 14-3652); Supplemental Letter Brief for United States at 1-4, United States v. Lee, No. 13-10517 (9th Cir. Aug. 17, 2015); Supplemental Brief for United States at 4-7, United States v. Grayer, No. 14-6294 (6th Cir. Aug. 20, 2015).

presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii); U.S.S.G. § 4B1.2(a)(2). *Johnson* held that this language—"otherwise involves conduct that presents a serious risk of physical injury to another"—was "hopelessly indeterminate" and "vague in all its applications." 135 S. Ct. at 2561. In so doing, the Court overruled *James v. United States*, 550 U.S. 192, 210 n.6 (2007), and *Sykes v. United States*, 131 S. Ct. 2267, 2276-77 (2011), which had rejected arguments that the residual clause was unconstitutionally vague.

Because the petitioner in *Johnson* was sentenced under the ACCA, the Court necessarily resolved the constitutionality of the residual clause in the ACCA context. But it would be incorrect to assume that the context in which *Johnson* was decided narrows the scope of the Court's vagueness holding. The Court identified "[t]wo features of the residual clause" that made the provision "unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557 First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

These invalidating features are equally present in the identically-worded residual clause in the Guidelines. Significantly, the Court's reasoning included analysis of the same grave uncertainties presented by the Guidelines' residual clause. The Court relied on four lower court decisions

interpreting the identical language in § 4B1.2(a)(2)[4] to demonstrate that it "has proved nearly impossible" for the lower courts to "mak[e] sense of the residual clause." *Id.* at 2559-60. The "most telling feature" of these decisions, the Court found, was "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560.[5] Thus, *Johnson* itself demonstrates that its holding, and the pivotal law and logic on which it rests, applies to the residual clause at § 4B1.2(a)(2), rendering it precisely the kind of "shapeless" enhancement provision prohibited by due process.

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[4] *See* 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

[5] The Court also granted certiorari, vacated the judgment, and remanded for further consideration in light of *Johnson* fourteen lower court decisions in which defendants had been sentenced under the Guidelines, including five cases on collateral review. *See Caldwell v. United States*, 136 S. Ct. 417 (2015) (direct review); *Banks v. United States*, 136 S. Ct. 365 (2015) (same); *McCarthren v. United States*, 136 S. Ct. 332 (2015) (same); *Gonzales v. United States*, 136 S. Ct. 84 (2015) (same); *Cooper v. United States*, 135 S. Ct. 2938 (2015) (same); *Maldonado v. United States*, 135 S. Ct. 2929 (2015); *Smith v. United States*, 135 S. Ct. 2930 (2015) (same); *Vinales v. United States*, 135 S. Ct. 2928 (2015) (same); *Talmore v. United States*, 135 S. Ct. 2937 (2015) (same); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (collateral review); *Denson v. United States*, 135 S. Ct. 2931 (2015) (same); *Jones v. United States*, 135 S. Ct. 2944 (2015) (same); *Jones v. United States*, 136 S. Ct. 333 (2015) (same); *Wynn v. United States*, 135 S. Ct. 2945 (2015) (same).

That *Johnson*'s holding applies to the Guidelines reflects the evolution and application of this Court's residual clause jurisprudence. While the Court's residual clause cases all have involved the ACCA, those decisions have consistently served as the controlling precedent for both ACCA and Guideline cases in the lower courts. *See, e.g., United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014) ("[W]e construe 'violent felony' under [the ACCA] and 'crime of violence' under the Guidelines as interchangeable."); *United States v. Womack*, 610 F.3d 427, 433 (7th Cir. 2010) ("We interpret coterminously the ACCA and the career offender § 4B1.1 provision."); *United States v. Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999) ("[I]t would be logically inconsistent" for a crime to qualify as a "crime of violence" and not as a "violent felony."); *United States v. Jarmon*, 596 F.3d 228, 231 n.* (4th Cir. 2010) ("[P]recedents evaluating the ACCA apply with equal force to U.S.S.G. § 4B1.2."); *Royce v. Hahn*, 151 F.3d 116, 120 (3d Cir. 1998) ("crime of violence" and "violent felony" "should be read consistently with each other"); *United States v. Hill*, 131 F.3d 1056, 1062 n.6 (D.C. Cir. 1997) ("violent felony" cases are "controlling" when interpreting "crime of violence").

Reliance on ACCA cases for the rule of decision in Guidelines cases is well-established in this very context. When this Court rejected suggestions that the residual clause in the ACCA was unconstitutionally vague in *James* and *Sykes*, the lower courts construed those decisions as binding authority necessarily foreclosing any vagueness challenge to the Guidelines' residual clause. As the Second Circuit explained, this Court's residual clause

decisions, albeit announced in the ACCA context, "implicitly repudiated" any argument that the Guidelines' residual clause was void for vagueness. *United States v. Van Mead*, 773 F.3d 429, 438 n.7 (2d Cir. 2014); *see also, e.g.*, *United States v. Spencer*, 724 F.3d 1133, 1137-78 (9th Cir. 2013) (claim that § 4B1.2(a)'s residual clause is unconstitutionally vague "foreclosed by Supreme Court precedent [in *James* and *Sykes*]"); *United States v. Mobley*, 687 F.3d 625, 632 n.7 (4th Cir. 2012) (vagueness challenge to Guidelines' residual clause must be rejected because "the Supreme Court has already determined that the residual clause constitutes an intelligible principle [that] provides guidance that allows a person to conform his or her conduct to the law.") (internal quotations omitted).

Developments since *Johnson* confirm that its holding applies to the Guidelines. The lower courts have held that *Johnson* renders the Guidelines' residual clause unconstitutionally vague. "If one iteration of the clause is unconstitutionally vague, so too is the other," the Tenth Circuit has explained, making clear that "[g]iven our reliance on the ACCA for guidance in interpreting § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA." *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015); *see also United States v. Townsend*, __ Fed. Appx. __, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015); *United States v. Darden*, 605 Fed. Appx. 545, 546 (6th Cir. July 6,

2015).[6] The Seventh and Eighth Circuits, the only two that previously held that the Guidelines were not subject to vagueness challenge, are poised to reject those holdings, and have assumed in the meantime that those decisions are no longer good law after *Johnson*.[7] Only the Eleventh Circuit has held

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[6] The First, Second, Fifth, and Ninth Circuits have applied *Johnson* to the Guidelines' residual clause based on the government's concession that it is unconstitutionally vague, and remanded for resentencing absent the unconstitutional residual clause. *See, e.g., United States v. Soto-Rivera*, __ F.3d __, 2016 WL 279364, at *5 (1st Cir. Jan. 22, 2016); *United States v. Maldonado*, __ Fed. Appx. __, 2016 WL 229833, at *3 (2d Cir. Jan. 20, 2016); *United States v. Estrada*, No. 15-40264, order at 1 (5th Cir. Oct. 27, 2015); *United States v. Benavides*, 617 Fed. Appx. 790, 2015 WL 5574264, at **1 (9th Cir. Sep. 23, 2015). The Fourth Circuit has assumed that *Johnson* invalidates the Guidelines residual clause, and that prior convictions that depend on the clause no longer qualify as crimes of violence. *United States v. Tucker*, __ Fed. Appx. __, 2016 WL 212502, at *1 (4th Cir. Jan. 19, 2016) (affirming because even without the prior offense upon which the sentencing court relied, the defendant had been convicted of a drug offense that qualified as a crime of violence).

[7] The Eighth Circuit explained that its "reasoning in *Wivell* that the Guidelines cannot be unconstitutionally vague is doubtful after *Johnson*," but left for the district court to decide in the first instance on remand whether the Guidelines' residual clause is unconstitutional. *United States v. Taylor*, 803 F.3d 931, 932 (8th Cir. 2015) (citing *Wivell v. United States*, 893 F.2d 156, 159 (8th Cir. 1990)). The Seventh Circuit has assumed "that the Supreme Court's reasoning [in *Johnson*] applies to section 4B1.2." *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015). It heard oral argument on December 2, 2015 in three cases in which the parties agree that *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012), which held that the Guidelines cannot be unconstitutionally vague, is no longer good law in light of *Johnson*. *United States v. Gillespie*, No. 15-1686 (7th Cir. argued Dec. 2, 2015); *United States v. Hurlburt*, No. 14-3611 (7th Cir. argued Dec. 2, 2015); *United States v. Rollins*, No. 13-

otherwise, and directed district courts to "still adhere" to decisions overruled by this Court in *Johnson*, *see United States v. Matchett*, 802 F.3d. 1185, 1195-96 (11th Cir. 2015), notwithstanding that those decisions "have proved to be anything but evenhanded, predictable, or consistent," *Johnson*, 135 S. Ct. at 2563, and "do[] not comport with the Constitution's guarantee of due process," *id.* at 2560.

The conclusion that *Johnson*'s holding applies to the Guidelines is compelled by *Johnson* itself, and is reinforced by longstanding residual clause jurisprudence in this Court and the lower courts. The overwhelming consensus is that *Johnson*'s holding *does* apply to the Guidelines.

II. The Court Should In No Way Endorse The Government's Novel Contention That *Johnson* Is Not Retroactive In Guidelines Cases.

Amici agree with the petitioner and the government that *Johnson* announced a substantive rule that therefore applies retroactively to cases on collateral review. The government, however, suggests a different result for those sentenced under

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1731 (7th Cir. argued Dec. 2, 2015). The government argues in these cases that "the identical language [in § 4B1.2] is unconstitutionally vague under *Johnson*," that *Johnson* "rejected" *Tichenor's* view that sentencing provisions are not subject to vagueness challenges, and that *Peugh v. United States*, 133 S. Ct. 2072 (2013) "repudiated" its view that the advisory Guidelines do not have legal force. Brief of Plaintiff-Appellee at 9, 13-14, United States v. Gillespie, No. 15-1686 (7th Cir. Sept. 14, 2015).

the identical clause of the Career Offender Guideline. The government states that "*Johnson* is not entitled to retroactive effect" in Guidelines cases, and asserts that this is so because "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." U.S. Br. 38 n.9.

The government's claim squarely conflicts with circuit precedent and its own position that this Court's ACCA-narrowing decisions are retroactive in ACCA cases and Guidelines cases alike, and would produce highly anomalous results. Moreover, the definitions of "procedural" and "substantive" rules the government suggests are legally unsound and unnecessary to the decision in this case. *Amici* therefore respectfully request that the Court not endorse the government's novel position or definitions in any way. The Court should decide this case under the well-settled understanding of retroactivity and in a manner that does not suggest a different result in the Guidelines context.

A. The Government's Claim That *Johnson* Is Not Retroactive In Guidelines Cases Squarely Conflicts With Circuit Precedent And The Government's Position Regarding ACCA-Narrowing Decisions.

That the rule announced in *Johnson* could be retroactive in ACCA cases but "not entitled to retroactive effect" in Guidelines cases, U.S. Br. 28 n.9, is unsupported. Courts of appeals that have decided the issue have consistently held that new rules narrowing the ACCA's residual clause apply

retroactively in Guidelines cases. *See United States v. Doe*, 810 F.3d 132, 154 & n.13 (3d Cir. 2015) (holding that *Begay v. United States*, 553 U.S. 137 (2008), applies retroactively in Guidelines cases); *Narvaez v. United States*, 674 F.3d 621, 625-26 (7th Cir. 2011) (holding that because *Begay* and *Chambers v. United States*, 555 U.S. 122 (2009) announced substantive rules, those rules apply retroactively in Guidelines cases); *Brown v. Caraway*, 719 F.3d 583, 594–95 (7th Cir. 2013) (same); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir. 2011) (holding that because its decision limiting the definition of burglary under the ACCA was substantive, it applies retroactively in Guidelines cases); *Rozier v. United States*, 701 F.3d 681 (11th Cir. 2012) ("The government concedes, and we take it as a given, that the Supreme Court's" decision interpreting the ACCA's elements clause "is retroactively applicable" in Guidelines cases.).

As the Third Circuit aptly put it, "Under *Teague*, either a rule is retroactive or it is not." *Doe*, 810 F.3d at 154 n.13. The government has argued just that in cases across the country. As stated by the Appellate Section of the Department of Justice, this Court's decision in *Begay* "applies retroactively to ACCA cases, mandatory guidelines cases, and advisory guideline cases alike." Supplemental Brief for United States on Rehearing En Banc at 48, Spencer v. United States, 773 F.3d 1132 (11th Cir. 2014) (en banc) (No. 10-10676). The government emphasized that "*Begay*'s status as a substantive rule is fixed," and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." *Id.* at 15. The

government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* at 15. Rather, "a rule either is or is not substantive." *Id.* Moreover, *Begay* "narrows eligibility for the advisory career-offender enhancement just as much as it narrowed eligibility for the [ACCA] enhancements," and "as in [ACCA] cases, no procedures can be afforded to render that enhancement applicable." *Id.* at 55.

Surprisingly, the government has now taken the exact opposite position with respect to the rule announced in *Johnson*, suggesting that it can vary from a substantive rule to a procedural rule depending on the context in which it is invoked. But there is nothing in the holding of *Johnson* or in this Court's retroactivity decisions to support the government's novel contention that *Johnson* is a "chameleon-like" rule. A rule is either retroactive or it is not.

Addressing the fact that the lower courts have applied *Begay* and *Chambers* retroactively in ACCA cases, the government argues here that "it would be highly anomalous if this Court's statutory-construction decisions narrowing the residual clause received retroactive effect, but the holding of *Johnson* invalidating that clause entirely did not." U.S. Br. 15. The lower courts have also applied these same ACCA-narrowing decisions retroactively to Guidelines cases. It would be just as anomalous if these decisions were applied retroactively in Guidelines cases, but *Johnson*'s holding, entirely invalidating the clause on constitutional grounds, was not.

Accordingly, the Court should decline the government's invitation to hold in this case that *Johnson* is a substantive rule "in ACCA cases," U.S. Br. 40, and it should otherwise avoid suggesting that the issue resolved here would be decided differently in Guidelines cases.

B. The Definitions Of Substantive And Procedural Rules The Government Suggests Are Unsound And Unnecessary To The Decision In This Case.

The Court should also refrain from endorsing the definitions of "procedural" and "substantive" the government suggests in support of its contention that *Johnson* is not retroactive in Guidelines cases, *i.e.*, "the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries." U.S. Br. 38 n.9. These definitions are legally unsound and unnecessary to the decision in this case.

The *Teague* bar potentially applies only to "new constitutional rules of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 310 (1989). Substantive rules are not subject to the *Teague* bar, *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004), and "have retroactive effect regardless of when a conviction became final," *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). No one disputes that a "rule of criminal procedure" regulates "*only the manner of determining* the defendant's culpability," *Summerlin*, 542 U.S. at 353, or that the rule announced in *Johnson* in no way fits that description. *See* U.S. Br. 28 (arguing that *Johnson* is not a

procedural rule because it did not impose a higher burden of proof, alter the admissible evidence, or change the factfinder, but rather struck the residual clause entirely); Pet. Br. 21-22 (similar).

The government, however, indicates that *Johnson* is transformed into a "rule of criminal procedure" in Guidelines cases because "the Guidelines are part of the process of imposing sentences." U.S. Br. 28 n.9. But if that were the definition of a "rule of criminal procedure," *Johnson* would be such a rule in both ACCA cases and Guidelines cases.[8] The rule announced in *Johnson*—that the language "otherwise involves conduct that presents a serious risk of physical injury to another" is unconstitutionally vague—says nothing about the "process of imposing sentences." The Court has never defined a "rule of criminal procedure" in the manner the government suggests, and should not do so now.

Nor has the Court ever limited substantive rules to those that "alter statutory boundaries." Rather, the Court has said that substantive rules "include" rules that "narrow the scope of a criminal statute by interpreting its terms," *Summerlin*, 542

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[8] Statutes, too, are a "part of the process of imposing sentences." And contrary to the government's assertion that the Guidelines themselves are not "substantive rules," U.S. Br. 38 n.9, an *ex post facto* increase in the applicable guideline range "alter[s] the substantive formula used to calculate the applicable sentencing range." *Peugh v. United States*, 133 S. Ct. 2072, 2088 (2013).

U.S. at 351-52 (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)), that "alter[] the range of conduct or the class of persons that the law punishes," *Summerlin*, 542 U.S. at 353 (citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)), or that "prohibit a certain category of punishment for a class of defendants because of their status or offense," *Saffle*, 494 U.S. at 494; *see also Montgomery*, 136 S. Ct. at 732. As the courts of appeals have found, *Johnson* fits comfortably within any of those formulations,[9] and the Court should not retreat from them now.

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[9] *See In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("'The new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms,'" and "'narrowed the class of people who are eligible for' an increased sentence under the [ACCA].") (internal citations and brackets omitted); *In re Watkins*, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* prohibits the imposition of an increased sentence on those defendants whose *status* as armed career criminals is dependent on offenses that fall within the residual clause.") (emphasis in original); *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) ("*Johnson*, we conclude, announced a new substantive rule. In deciding that the residual clause is unconstitutionally vague, the Supreme Court prohibited 'a certain category of punishment for a class of defendants because of their status.'") (internal citations omitted); *cf. Narvaez*, 674 F.3d at 626 ("*Chambers*, like *Begay*, falls within the class of decisions that 'prohibit[] a certain category of punishment for a class of defendants because of their status or offense.'") (internal citation omitted); *Reina-Rodriguez*, 655 F.3d at 1189 ("*Grisel* announced a substantive rule [by] alter[ing] the conduct that substantively qualifies as burglary").

Finally, the government suggests that *Teague*, which arose in the state-prisoner context, applies to federal § 2255 proceedings. U.S. Br. 21 n.5. This Court has repeatedly reserved judgment on that issue, *see Chaidez v. United States*, 133 S. Ct. 1103, 1113 n.16 (2013); *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008), and there are reasons why *Teague* may not apply, at least not with full force, to § 2255 proceedings, *see, e.g.*, Brief Amici Curiae of Habeas Scholars and Constitutional Accountability Center in Support of Petitioner at 5-8, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820). That issue was not presented below or sufficiently briefed here; this Court should do no more than assume, without deciding, that *Teague* applies in this case. *See Chaidez*, 133 S. Ct. at 1113 n.16.

III. The Court Should Resolve *Johnson*'s Retroactivity In Guidelines Cases This Term.

The Court should resolve the issue of *Johnson*'s retroactivity in the Guidelines context this Term, for many of the same reasons it granted *certiorari* and expedited briefing in this case. The circuits are now staying ACCA and Guidelines cases pending a decision here. But while circuit law has thus far been settled that ACCA decisions apply retroactively to Guidelines cases, the government is advancing its contrary position across the country. Thus, without presuming the result in this case, a decision that *Johnson* is retroactive will not resolve the issue in Guidelines cases.[10] Meanwhile, there is

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[10] While no court of appeals has definitively resolved the issue, the courts are reaching divergent conclusions in *dicta* and in

an ever-shortening one-year statute of limitations, requiring federal prisoners to file any *Johnson*-based § 2255 motions by June 26, 2016—one year from the date *Johnson* was decided. Critically, that deadline remains fixed even if this Court or other courts later hold that *Johnson* applies retroactively in Guidelines cases. *See* 28 U.S.C. § 2255(f)(3); *Dodd v. United States*, 545 U.S. 353, 357 (2005).

Most prisoners who stand to benefit from *Johnson* are serving lengthy career-offender sentences under the Guidelines, and many have already litigated their initial § 2255 motion.[11] Those

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non-precedential orders. The Eleventh Circuit said in *dicta* in *In re Rivero*, 797 F.3d 986 (11th Cir. 2015), a Guidelines case, that if the petitioner were "seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively." *Id.* at 991. The Seventh Circuit held in *Price v. United States*, 795 F.3d 731 (7th Cir. 2015), an ACCA case, that "*Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive," *id.* at 732, then authorized several second or successive § 2255 motions in Guidelines cases based on *Price*. *See, e.g., Stork v. United States*, No. 15-2687, order at 1 (7th Cir. Aug. 13, 2015); *Best v. United States*, No. 15-2417, order at 1–2 (7th Cir. Aug. 5, 2015); *Swanson v. United States*, No. 15-2776, order at 1 (7th Cir. Sept. 4, 2015); *Zollicoffer v. United States*, No. 15-3125, order at 1 (7th Cir. Oct. 20, 2015); *Spells v. United States*, No. 15-3252, order at 1 (7th Cir. Oct. 22, 2015). The Eighth Circuit, in contrast, denied authorization of a successive motion in a Guidelines case. *See Richardson v. United States*, 623 Fed. Appx. 841, 842 (8th Cir. 2015) (unpublished).

[11] Judging by the ongoing reviews conducted by Federal Defender Offices across the country, a majority of career offenders were qualified as such based on prior drug offenses, rather than by residual-clause offenses. *Accord* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving*

prisoners are now in a successive posture, and, if the Court does not resolve *Johnson*'s Guidelines implications this Term, they will not be able to file *Johnson* § 2255 motions before the limitations period expires. That is because they must obtain authorization from the court of appeals to file a successive § 2255 motion. *See* 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656 (2001).

As noted, courts of appeals have deferred ruling on ACCA and guidelines cases pending a decision in this case, but may later decide (incorrectly in the view of *amici*) that a ruling in petitioner's favor in this case does not decide the retroactivity issue in guidelines cases. Denials of authorization cannot be appealed to this Court. *See* 28 U.S.C. § 2244(b)(3)(E). Therefore, without a ruling on retroactivity in the Guidelines context this Term, any eventual authorization from the court of appeals to file a successive § 2255 motion would be meaningless because the statute of limitations will have expired. That would leave many thousands of *Johnson* claimants with no recourse except an original habeas petition filed in this Court.[12]

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the Goals of Sentencing Reform 133 (2004) ("Most of these offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guidelines.").

[12] Prisoners who have not yet had their initial § 2255 motion adjudicated, of course, may file or amend such motions to seek relief under *Johnson* before the limitations period expires. While the Fifth Circuit has held *Johnson* non-retroactive even in the ACCA context, prisoners with initial § 2255 motions there may at least file and petition this Court for *certiorari*—an avenue unavailable to prisoners in a successive posture. *See In*

That scenario is not only plausible, it is probable. Nearly every court—and even the government—agree that *Johnson* is retroactive in the ACCA context.[13] But again, even if this Court were to confirm that consensus, such a holding is unlikely to definitively resolve the retroactivity question in Guidelines cases. The inevitable flood of original habeas petitions in this Court may be averted only if the Court comprehensively resolves *Johnson*'s retroactivity this Term.[14]

Importantly, *Johnson*'s retroactivity should not develop on a piecemeal basis. If the Court holds

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re Williams, 806 F.3d 322, 324-26 (5th Cir. 2015); 28 U.S.C. § 2244(b)(3)(E).

[13] *See Watkins*, 2015 WL 9241176, at *5-6; *Price v. United States*, 795 F.3d 731, 733-34 (7th Cir. 2015); *Richardson v. United States*, 623 Fed. Appx. 841, 842 (8th Cir. 2015); *see also Pakala v. United States*, 804 F.3d 139, 140 (1st Cir. 2015) (*prima facie* showing that *Johnson* retroactive); *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (same).

[14] Conceivably, the problem could be avoided short of a merits determination this Term if the Court were to accept a case this Term for argument and decision next Term, while at the same time instructing the courts of appeals to hold prisoners' applications to file a successive § 2255 motion pending decision in the accepted case. Amici urge this approach if the Court is not inclined to decide the issue on the merits this Term. This would at least allow petitioners to file protective § 2255 petitions in the district court within the one-year statute of limitations, while urging district courts to hold the petitions in abeyance pending the decisions of the court of appeals on the applications to file successive petitions.

Johnson retroactively applicable in the ACCA context and takes no further action, the lower courts will be confronted with the government's argument that *Johnson* is not retroactive as applied to the Guidelines. Those courts may very well reach divergent conclusions, and the question would almost surely make its way to this Court—but not for another year or two. In the meantime, litigation would persist, additional unforeseen issues would arise, and thousands of federal prisoners would be left in legal limbo.

Finally, the stakes are high. If those sentenced under the Guidelines' residual clause are eligible to seek *Johnson* relief, many would be entitled to immediate release and should not be forced to serve additional time waiting for their claims to be considered on the merits. In the meantime, some courts likely will grant relief, only to have to undo those decisions—including recalling prisoners back into custody—if the Court were to ultimately reverse them. Resolving the retroactivity issue now would avert that predictable morass and spare lower courts the burdens of continued first-round litigation.

Amici are aware of two cases that raise the issue of *Johnson*'s retroactivity in the Guidelines context. *Rivero* is a pending original habeas matter in which the Court has ordered a response from the United States (due March 2, 2016). *In re Rivero*, No. 15-7776 (S. Ct. filed Jan. 14, 2016). *Jones* is a forthcoming petition for *certiorari* from the Third Circuit's denial of a certificate of appealability. *United States v. Alfrederick Jones*, No. 14-2882 (3d Cir. reh'g denied Jan. 22, 2016). *Amici* respectfully

urge the Court to accept both cases and decide this important issue this Term.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and hold that *Johnson* applies retroactively.

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